In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 854

VASE CALVIN VALRIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Southern District of California, petitioner was convicted on counts 1 and 2 of an indictment charging the unlawful sale of heroin and its receipt and concealment in violation of 21 U.S.C. 174 (R. I, 1-2; R. II, 4; R. III, 22).[1] On September 6,

[1] Petitioner was found not guilty on counts 3 and 4 involving another narcotics sale on a different date (R. I, 4-5; R. III, 22).

1961, he was sentenced as a second offender to concurrent terms of imprisonment for twenty years (R. I, 21-23; R. III, 32, 41-42). The conviction was affirmed on appeal (R. I, 24-25, 39).

The evidence showed that in December 1960 federal narcotics agent Nickoloff arrested one William Green in San Francisco and later brought him to Los Angeles to serve as an informer in making purchases of narcotics (R. II, 14-15). On January 11, Nickoloff and other agents rented rooms in a Los Angeles motel for themselves and for Green (R. II, 16-18). At about 7:40 p.m. on that day, agent Ohlson instructed Green to make a telephone call to petitioner from a telephone booth in the motel (R. II, 18, 91-92). After entering the booth with Green, Ohlson placed over the hearing piece of the telephone a "twin-phone", which had a "little tube with a hearing piece on the other end where another person may listen" (R. II, 92). Over defense objection that this constituted unlawful interception of the telephone conversation within the meaning of 47 U.S.C. 605 and that there had been no proof of consent by Green, Ohlson was permitted to testify to the conversation (R. II, 92-94). Ohlson also testified over objection to a conversation similarly overheard after midnight on January 12, when Green called petitioner's number and was told that "Val" was already on his way over (R. II, 20-22). Later that morning Nickoloff overheard, by means of a Fargo transmitter which had been placed under the bed in Green's room, a conversation in which petitioner stated that the "* * * man has four pieces and has to cut it up. It

won't be ready until morning" (R. II, 38, 23). On January 12 at 7:40 a.m., a twin-phone device was used to enable Ohlson to hear another conversation, again admitted in evidence over objection, in which petitioner told Green, "Sit tight, I'll bring the stuff by in about 45 minutes" (R. II, 99-100). Green's person and his room were searched and he was given $500 (R. II, 40). Petitioner arrived at about 11:40 and left five minutes later (R. II, 41-42). Green then gave the agents a rubber contraceptive containing a white powder which proved to be heroin (R. II, 8-10, 42-44, 70). When the agents searched Green's room the $500 was not found (R. II, 42). Shortly thereafter an agent who had followed petitioner saw him exhibiting a large roll of money to several persons at a service station (R. II, 192-193).

Petitioner's contention that the use of the twin-phone device was an unlawful interception in violation of Section 605 of the Communications Act was properly rejected by the court below. Use of a twin-phone with the consent of one of the parties to the conversation is not an unlawful interception. *E.g.*, *McClure* v. *United States*, 332 F. 2d 19, 22 (C.A. 9), certiorari denied, 380 U.S. 945; *Wilson* v. *United States*, 316 F. 2d 212, 213 (C.A. 9), certiorari denied, 377 U.S. 960. See also *United States* v. *Ballou*, 348 F. 2d 467, 468 (C.A. 2). So far as the rights protected by Section 605 are concerned, the situation is essentially the same as where one party to a telephone conversation records it—evidence held properly admitted in *Rathbun* v. *United States*, 355 U.S. 107. This Court noted in *Rathbun* that there

would have been no unauthorized interception if one party to the telephone conversation had "held out his handset so that another could hear out of it" (355 U.S. at 110-111). A twin-phone is a mechanical device to accomplish the same purpose.

The evidence showed that the informer Green, who died before trial, had consented to use of the device. Since the agents were standing next to Green in the public telephone booth when they used the twin-phone, it is clear that he knew what they were doing and consented thereto. The agent who brought Green to Los Angeles testified and was subject to cross-examination, but petitioner concedes that "[n]o evidence of lack of consent was offered" (Pet. 3). There is no occasion, therefore, to consider who had the burden of proof on this issue since the only inference from evidence in the record is that Green consented.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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